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No. 01-686

In the Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., AND INGERSOLL PICKUP INC.

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA, AND COUNTY OF HERKIMER

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In this case, an unusually broad range of entities have made the identical point that there is uncertainty in the law regarding flow control ordinances and that failure to resolve that uncertainty will have dramatic, deleterious consequences. These entities include the Second Circuit itself, which recognized that the "missing pieces to the constitutional puzzle often force states and municipalities to engage in guesswork about the constitutionality of proposed solid waste management schemes, which are expensive and time-consuming to implement" (Pet. App. 12a); the State of New Jersey, which filed an amicus brief supporting certiorari and asserting that "[t]he legal uncertainty regarding permissible government regulation of solid waste collection and disposal has compounded" New Jersey's waste management problem (Brief of Amicus Curiae State of New Jersey in Support of the Petition for Certiorari (hereinafter "New Jersey Brief") at 1); and a wide variety of business groups that have expressed "serious concern regarding the impact of the Second Circuit's decision on the functioning of the interstate market for solid waste and recycling services" and urge "[p]rompt review by the Court * * * to ensure that the interstate trade in solid waste and recyclables and the constitutional principles underlying the Commerce Clause are not once again thwarted" (Brief of *Amici Curiae* National Solid Wastes Management Association, American Forest and Paper Association, Inc., American Trucking Associations, Inc., Association of American Railroads and National Association of Manufacturers in Support of the Petition (hereinafter "Industry Amicus Brief") at 3, 6).

For its own part, respondent acknowledges (Opp. 4) that the issue presented in the petition is "potentially interesting."[1]

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[1] Of the three respondents, only Oneida-Herkimer Solid Waste Management Authority has filed an opposition. The County of

And, even more telling, an association of which respondent is a member has taken the unusual step of filing an amicus brief in opposition to certiorari contending that "it is vital to the public interest that the decision of the Second Circuit be left to stand." Brief of Amicus Curiae the New York State Association for Solid Waste Management in Support of Respondents at 2. This statement is a compelling indication that NYSASWM expects the Second Circuit's ruling to have implications well beyond Oneida and Herkimer Counties.

Although recognizing the "potentially interesting" nature of the question presented and acknowledging New Jersey's "desire to have the Court grant review" (Opp. 5), respondent offers a range of reasons for denying certiorari. None warrants allowing the "legal uncertainty" about which New Jersey has expressed concern to fester any longer.

1. Respondent's principal ground for denying the petition is the fact that the case is technically interlocutory. Of course, this Court's "cases make clear that there is no absolute bar to review of nonfinal judgments of the lower federal courts." *Mazurek v. Armstrong,* 520 U.S. 968, 975 (1997) (per curiam). Indeed, during the past few Terms this Court has regularly granted certiorari in cases in which federal courts of appeals reversed summary judgments or dismissals and remanded for further proceedings. See, *e.g., Toyota Motor Mfg., Kentucky, Inc. v. Williams,* No. 00-1089, cert. granted, 121 S. Ct. 1600 (2001) (granting certiorari to review reversal of summary judgment); *TRW, Inc. v. Andrews,* 122 S. Ct. 441, 446 (2001) (Court granted certiorari to review reversal of summary judgment); *Correctional Servs. Corp. v. Malesko,* 122 S. Ct. 515, 518 (2001) (Court granted certiorari to review reversal of dismissal); *Norfolk Shipbuilding & Drydock Corp. v. Garris,* 121 S. Ct. 1927, 1929 (2001) (Court granted certiorari to review reversal of dismissal); *New York Times Co. v. Tasini,*

Oneida has filed a waiver and, to our knowledge, the County of Herkimer has not filed anything.

121 S. Ct. 2381, 2386-2387 (2001) (Court granted certiorari to review reversal of summary judgment). See also *National R.R. Passenger Corp. v. Morgan*, No. 00-1614, cert. granted, 121 S. Ct. 2547 (2001) (granting certiorari to review legal ruling that resulted in reversal of jury verdict and remand for a new trial).

As the leading commentators explain, "the interlocutory status of the case may be no impediment to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation." R. STERN ET AL., SUPREME COURT PRACTICE § 4.18 (8th ed. 2002) (forthcoming). That is precisely the situation here. As the three amicus briefs reflect, there can be no denying that the Second Circuit has decided an important issue that is worthy of review. Nor can there be any doubt that this Court's intervention could "hasten or finally resolve the litigation": If the Court were to reject the Second Circuit's public/private distinction, the case would be controlled by *Carbone* and the summary judgment would therefore almost certainly be reinstated, leaving only the issue of damages to be resolved on remand.

On the other side of the ledger, there is virtually nothing to be gained by waiting. To begin with, respondent is mistaken in suggesting (Opp. 4) that the "ultimate resolution" of the issue presented in the petition "would be better decided on a factual record that conveys a complete picture." The Second Circuit has held, as a matter of law, that *Carbone* does not apply to publicly owned facilities. The district court's mandate is limited to applying the *Pike* test. Any "factual record" developed in the district court cannot and will not be used to revisit the Second Circuit's legal determination that the virtually *per se* rule of invalidity is inapplicable to ordinances that require that waste be delivered to publicly owned facilities.

Moreover, notwithstanding respondent's assertion (Opp. 1) that "further proceedings in the district court are required to

develop the factual record necessary to determine whether the ordinances in question violate the Dormant Commerce Clause," the Second Circuit has already made it more than clear that petitioners have little hope of prevailing under the *Pike* test. That court twice indicated that it was "tempt[ed]" to hold that the ordinances are lawful under the *Pike* test "as a matter of law." Pet. App. 31a, 32a. Although ultimately not going that far, it went just up to the line, emphasizing to the district court that (i) it is "well-settled" that "waste disposal is a traditional local government function" (*id.* at 31a); (ii) the interests served by municipal waste management programs are "compelling" (*id.* at 32a (internal quotation marks omitted)); and (iii) "the fact that a municipality is acting within its traditional purview must factor into the district court's determination of whether the local interests are substantially outweighed by the burdens on interstate commerce" (*ibid.*). In the face of such unambiguous direction from the court of appeals, the proceedings on remand are likely to be little more than a formality. And, needless to say, if the district court does follow the Second Circuit's clear lead, the outcome of the ensuing appeal will be a foregone conclusion. But the whole process could take another few years, if not longer. Meanwhile confusion as to the validity of flow control ordinances both in the Second Circuit and elsewhere would continue unabated — if not be exacerbated as other local governments seek to follow the Second Circuit's roadmap for circumventing *Carbone*. In such circumstances, prudential considerations favor granting certiorari, not delaying it.

2. Respondent next attempts to distinguish *Carbone* on a variety of grounds, some of which are flatly wrong and others of which are distinctions that make no legal difference.

First, respondent observes (Opp. 8) that the ordinances in this case, unlike the one in *Carbone,* do not have the effect of requiring waste generated outside the counties to be processed locally. But *Carbone* did not turn on the fact that the flow control law in that case had the effect of requiring the petitioner

to bring out-of-state waste to the town's facility. Instead, the Court broadly held that "the flow control ordinance discriminates, for it allows only the favored operator to process waste that is within the limits of the town." 511 U.S. at 391. See also *id.* at 389 ("[E]ven as to waste originant in Clarkstown, the ordinance prevents everyone except the favored local operator from performing the initial processing step. The ordinance thus deprives out-of-state businesses of access to a local market."); *id.* at 392 (challenged ordinance "hoards solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility"); *ibid.* ("The flow control ordinance at issue here squelches competition in the waste-processing service altogether, leaving no room for investment from outside.").

Second, respondent observes (Opp. 8) that, unlike in *Carbone,* here "there is no local operator receiving any arguable benefit from the local legislation." Although this is really just a short-form version of respondent's argument on the merits, it is notable that respondent ignores entirely the fact that in *Carbone* the preferred facility was scheduled to become publicly owned within a year. It is inconceivable that this Court expected its holding in *Carbone* to be applicable only for that remaining year.

Third, respondent suggests (Opp. 9) that it has greater responsibilities for safe disposal of the waste it receives than did the town in *Carbone*. Not only is that assertion irrelevant to the question whether the ordinances discriminate, but it also ignores the fact that Clarkstown raised — and this Court rejected — the contention that its flow control ordinance was necessary to ensure safe disposal of waste generated within the town (see 511 U.S. at 393).

Fourth, respondent contrasts its facilities, which it asserts "were planned and constructed after a long and deliberative public process," with Clarkstown's ordinance, which it characterizes as a "quick fix." Opp. 9. Again, this distinction

is utterly irrelevant to the question whether the challenged ordinances discriminate. In any event, as a side-by-side comparison will reveal, the ordinance in *Carbone* is no less thorough than the ordinances at issue here.

Fifth, respondent contends (Opp. 9-10) that the purpose of its ordinances is to manage waste publicly, while the purpose of Clarkstown's ordinance was to "ensure the consummation of private commerce." Once again, this distinction is irrelevant to the question whether the ordinances discriminate against interstate commerce. Moreover, respondent ignores the fact that Clarkstown's ultimate plan was to take title to the transfer station once the private company that built it had recouped its investment.

3. We pointed out in the petition (at 14, 19-22) that, if allowed to stand, the Second Circuit's decision would surely encourage local governments in other states to adopt flow control ordinances. Respondent answers (Opp. 11) that "[t]he absence in the Oneida-Herkimer legislation of any interstate reach to capture waste generated in other states largely eliminates any risk of retaliatory action by a neighboring state" and that "retaliation will not occur because Oneida-Herkimer is simply exercising its municipal power, derived from the sovereign power of the State of New York, to provide the same sort of governmental service which all other states have traditionally provided to their citizens." Whether labeled "retaliation" or "self-interest" or "self-preservation," however, it simply is undeniable that, if given the opportunity to impose flow control and thereby extract monopoly prices, many municipalities throughout the country will do so. See Industry Amicus Brief at 6-7 ("a snowball effect is inevitable, as localities faced with the sudden loss of solid waste on which their own waste facilities depend seek to protect their own financial interests, both by reinstituting flow control for their publicly owned facilities and by converting those that are now privately owned"); *id.* at 12 ("In Pennsylvania, for example, which received 4.7 million tons of waste from New York in

2000, or in other states, a loss of New York-origin waste will undoubtedly lead to flow control laws as local governments act to hoard all of their own 'home-grown' product.").

4. Respondent next invokes *California Reduction Co. v. Sanitary Reduction Works of San Francisco*, 199 U.S. 306 (1905), and the Resource Conservation and Recovery Act ("RCRA") for the proposition that both Congress and this Court have recognized "the traditional power of states and local governments to regulate for the provision of comprehensive waste services." Opp. 11. Of course, neither recognized an entitlement to discriminate against interstate commerce, which is what *Carbone* and this case are about.[2]

5. Respondent urges the Court to ignore the inconsistency of the Second Circuit's decision with the many decisions that have invalidated statutes that required waste to be processed at local, publicly owned facilities, stating (Opp. 13) that those cases involved "a variety of particular problems, proposed solutions, regulatory philosophies, and difficulties with the private sector" and that "[t]he waste management challenges facing" these geographically "diverse" localities "were each unique and reflective of local conditions." To begin with, the variations asserted by respondent are overblown to say the least. The flow control ordinances in the various cases all had the underlying objective of securing a dependable volume of waste in order to guarantee funding for a local waste facility. In any event, as we find ourselves repeating, the kind of differences to which respondent points simply are not relevant to the question whether the challenged ordinances discriminate.

Respondent also asserts (Opp. 14) that the cases we cited "have not been free of confusion or debate over ownership or local private benefit, and reviewing courts have often found

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[2] It merits noting in this regard that in *Carbone* Clarkstown and its amici placed heavy reliance on both *California Reduction* and RCRA to no avail.

alternate grounds for decision." Respondent offers no example in support of this *ipse dixit*. It simply isn't so.

6. Respondent concedes (Opp. 15) that the market participant doctrine is inapplicable to the challenged ordinances. It nevertheless sees no tension between that concession and the Second Circuit's holding that the mere fact of government ownership of the preferred facility precludes a finding of discrimination against interstate commerce. The tension is this: The function of the market participant doctrine is to put state and local governments on ***an even footing*** with private businesses when they act as market participants. The Second Circuit's rule, however, allows local governments to use their regulatory powers to give themselves a competitive advantage — indeed, to eliminate competition entirely — subject only to the deferential *Pike* balancing test. The Court's caution against expanding the market participant doctrine too broadly (*South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 97 (1984) (plurality op.)) is of little significance if it can be circumvented simply by holding that a state or local government does not discriminate against interstate commerce when it favors a business it owns rather than one that is privately owned.

Respondent's contention (Opp. 15) that the antitrust laws would limit the circumstances in which local governments would be able to take advantage of this incongruity is only partly correct. First of all, as one of its own cases reflects, states are immune entirely from the antitrust laws. *Parker v. Brown*, 317 U.S. 341 (1943). Accordingly, the antitrust laws would not prevent state governments from establishing their own businesses and then excluding competition. Second, as respondent's other case indicates, local governments are free to engage in anticompetitive conduct if authorized by their states to do so. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 414-417 (1978) (plurality op.). Given the proliferation of state statutes authorizing the imposition of flow control (see Pet. 19 n.5), it is hardly alarmist to suggest that the

Second Circuit's decision could encourage states to authorize anticompetitive action by their subdivisions in other contexts.

7. Finally, respondent deems "hyperbol[ic]" our contention that the Second Circuit's decision will embolden municipalities around the country to reinstitute flow control ordinances that were struck down or abandoned in the wake of *Carbone* and/or enact new ones. Opp. 15. According to respondent, "[n]othing about flow control makes it easier for municipalities to site and build waste disposal facilities within their jurisdictions" (*ibid.*), and "local governments which have managed to find effective solutions which do not involve siting, building or acquiring public facilities are not likely to reverse course" (*id.* at 16). This misses the point. Whether or not municipalities are likely to build new facilities (and we think it is obvious that, so long as people continue to produce waste, at least some localities will have to), there are already hundreds, if not thousands, of communities around the country that have existing facilities that are strained for funding. That is no doubt what prompted New Jersey to file an amicus brief supporting certiorari and stating: "Nowhere is an answer to this open question needed more than in the State of New Jersey, where over $200 million has already been expended from the State Treasury to prevent defaults on public debt obligations and where over $1 billion in public solid waste debt remains outstanding." New Jersey Brief at 2. We might add only that an answer is needed by communities, haulers, generators, and disposal, processing, and recycling facilities throughout the country as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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